2001 JUDGE ADVOCATE OFFICER ADVANCED COURSE

CHAPTER 10

POST-TRIAL PROCESSING

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Outline of Instruction

"It is at the level of the convening authority that an accused has his best opportunity for relief. "-United States v. Boatner, 43 C.M.R. 216, 217 (C.M.A. 1971).

"The essence of post-trial practice is basic fair play -- notice and an opportunity to respond." United States v. Leal, 44 M.J. 235 (1996).

"We are no longer confident that returning cases for a new recommendation and action is a productive judicial exercise in the absence of some indication that the information presented to the convening authority on remand will be significantly different." "[The appellant must] demonstrate prejudice by stating what, if anything, would have been submitted to 'deny, counter, or explain' the new matter." United States v. Chatman, 46 M.J. 321 (1997).

The following is the "process for resolving claims of error connected with a convening authority's post-trial review. First, an appellant must allege the error. . . . Second, an appellant must allege prejudice. . . . Third, an appellant must show what he would do to resolve the error if given such an opportunity." United States v. Wheelus, 49 M.J. 283 (1998).

"All this court can do to ensure that the law is being followed and that military members are not being prejudiced is to send these cases back for someone TO GET THEM RIGHT." United States v. Johnston, 51 M.J. 227 (1999).

I. REFERENCES.

A. UCMJ, articles 57-58, 60-67.

B. Manual for Courts-Martial, United States, Chapters XI, XII.

C. Dep't of Army, Regulation 27-10, Legal Services: Military Justice, Chapter 5 (20 August 1999).

D. Francis A. Gilligan and Frederic I. Lederer, *Court-Martial Procedure*, 1991 (vol 2), Chapter 24.

II. GOALS OF THE PROCESS.

A. Prepare a record adequate for appellate review.

B. Identify, correct, curtail or kill incipient appellate issues.

C. Accused's best chance for clemency.

D. Defense notice and opportunity to be heard before convening authority (CA) initial action on a case.

E. Help CA make informed decision when taking initial action on a case.

III. SUMMARY OF THE PROCESS.

A. TC coordinates with unit *before trial* to coordinate transportation to confinement facility.

B. Sentence is announced and the court is adjourned.

C. TC prepares report of result of trial, confinement order.

D. Request for deferment of confinement, if any.

E. Exhibits reproduced.

F. Post-trial sessions, if any.

G. Record of trial (ROT) created, reproduced.

H. TC/DC review ROT for errata.

I. Military judge (MJ) authenticates ROT.

J. SJA signs post-trial recommendation (PTR).

K. PTR, authenticated ROT served on accused / DC.

L. Accused / DC submits clemency petition (R.C.M. 1105 matters) and response to PTR (R.C.M. 1106 matters). Often done simultaneously.

M. SJA signs addendum.

N. *Addendum served on DC and accused if contains "new matter."

O. CA considers DC / accused submissions, takes initial action.

P. Promulgating order signed.

Q. Record mailed.

R. Appellate review.

IV. DUTIES OF COUNSEL (RCM 502(d)(5), (6))(RCM 1103(b)(1))

A. Paragraph (F) of the Discussion to R.C.M. 502(d)(5) addresses the trial counsel's (TC's) post-trial duties.

1. Prepare Report of Result of Trial.

2. Supervise preparation, authentication and distribution of the ROT.

3. Review ROT for errata.

B. Paragraph (E) of the Discussion to R.C.M. 502(d)(6) addresses the defense counsel's (DC's) post-trial duties.

1. Advise the accused of post-trial and appellate rights (not technically post-trial – R.C.M. 1010).

2. Deferment of confinement.

3. Examination of the record.

4. Submission of matters: R.C.M. 1105; 1106(f)(4),(7); 1112(d)(2). *See also* UCMJ, art. 38(c).

5. Appellate rights review and waiver.

6. Examine PTR.

7. *See also United States v. Palenius*, 2 M.J. 86 at 93 (C.M.A. 1977).

   a. Appellate rights and review process advice.

   b. Appellate issues; *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

   c. Act in accused's interest. *See United States v. Martinez*, 31 M.J. 525 (A.C.M.R. 1990).

   d. Maintain an attorney-client relationship. R.C.M. 1106(f)(2) (for substitute counsel); *United States v. Schreck*, 10 M.J. 226 (C.M.A. 1981); *United States v. Titsworth*, 13 M.J. 147 (C.M.A. 1982); *United States v. Jackson*, 34 M.J. 783 (A.C.M.R. 1992) (some responsibility placed on the SJA).

   United States v. Palenius, 2 M.J. at 93 (C.M.A. 1977). "The trial defense attorney . . . should maintain the attorney-client relationship with his client subsequent to the [trial] . . . until

substitute trial [defense] counsel or appellate counsel have been properly designated and have commenced the performance of their duties. . . ."

C. Effectiveness of counsel in the post-trial area is governed by *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Lewis*, 42 M.J. 1 (1995). *See also United States v. MacCulloch*, 40 M.J. 236 (C.M.A. 1994). *See also United States v. Brownfield*, 52 M.J. 40 (1999), and *United States v. Lee*, 52 M.J. 51 (1999).

V. NOTICE CONCERNING POST-TRIAL AND APPELLATE RIGHTS. R.C.M. 1010.

Before adjournment of any general and special court-martial, the MJ shall ensure that the DC has informed the accused orally and in writing of:

A. The right to submit post-trial matters to the CA;

B. The right to appellate review, as applicable, and the effect of waiver or withdrawal of such rights;

C. The right to apply for relief from TJAG if the case is neither reviewed by a Court of Criminal Appeals nor reviewed by TJAG under R.C.M. 1201(b)(1); and

D. The right to the advice and assistance of counsel in the exercise or waiver of the foregoing rights.

The written advice to the accused concerning post-trial and appellate rights shall be signed by the accused and DC and inserted in the record as an appellate exhibit.

VI. REPORT OF RESULT OF TRIAL; POST-TRIAL RESTRAINT; DEFERMENT OF CONFINEMENT. ARTICLES 60 AND 57, UCMJ; R.C.M. 1101.

A. TC notifies accused's immediate commander, CA or designee, and confinement facility of results. (DA Form 4430-R, Department of the Army Report of Result of Trial (AR 27-10)).

B. The accused's commander may delegate to TC authority to order accused into post-trial confinement.

C. Accused may request deferment of confinement.

1. Accused burden to show "the interests of accused and community in release outweigh the community's interest in confinement."

2. Factors CA may consider include: "the command's immediate need for the accused" and "the effect of deferment on good order and discipline in the command."

3. CA's written action on deferment is subject to judicial review for abuse of discretion.

4. CA must specify why confinement is not deferred.

a. *United States v. Schneider*, 38 M.J. 387 (C.M.A. 1993). CA refused to defer confinement "based on seriousness of the offenses of which accused stands convicted, amount of confinement imposed by the court-martial and the attendant risk of flight, and the adverse effect which such deferment would have on good order and discipline in the command." Accused alleges abuse of discretion in refusing to defer confinement. HELD: Even though explanation was conclusory, it was sufficient. Court noted other matters of record supporting decision to deny deferment.

b. *Longhofer v. Hilbert*, 23 M.J. 755 (A.C.M.R. 1986).

c. *See also United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992).

d. *United States v. Dunlap*, 39 M.J. 1120 (A.C.M.R. 1994). Remedy for failure to state reasons for denying deferment request is petition for extraordinary relief. Failure to do so, however, moots most remedies available. Court reviewed facts and determined that deferment was not appropriate.

e. *United States v. Edwards*, 39 M.J. 528 (A.F.C.M.R. 1994). Accused not entitled to relief (no reasons for denial) where deferment would have expired before appellate review. AFCMR recommends that DC ask for "statement of reasons" or petition for redress under Art. 138.

VII. POST-TRIAL SESSIONS ARTICLE 39, UCMJ; R.C.M. 1102, 905.

A. Types of post-trial sessions:

1. Proceedings in revision (to correct an apparent error, omission, or improper or inconsistent action by the court-martial); and

2. Art. 39(a) sessions to inquire into and resolve "any matter which arises after trial and which substantially affects the legal sufficiency of any finding of guilty or the sentence." The MJ "shall take such action as may be appropriate." R.C.M. 1102(b)(2).

United States v. Mayfield, 45 M.J. 176 (1996). Accused's written judge alone (JA) request never signed by parties and made part of record orally confirmed on the record. Before authentication, MJ realized omission and called proceeding in revision, at which accused acknowledged he had made request in writing and that JA trial had been his intent all along. Note: also shows that it does not matter how the post-trial proceeding is labeled, as he called it a post-trial Art. 39(a) session, though the court characterizes it as a proceeding in revision. CAAF reverses Navy Court, which had found it to be jurisdictional error.

United States v. Avery, Army 9500062 (17 May 1996)(unpub.). Post-trial Art. 39(a) called to inquire into allegations that a sergeant major (SGM) slept through part of the trial. Testimony of MAJ H, panel president, about "SGM A's participation during deliberations . . . was relevant and admissible." MJ "properly stopped appellant's trial defense counsel from asking MAJ H about any opinions expressed by SGM A during deliberations."

United States v. Crowell, 21 M.J. 760 (N.M.C.M.R. 1985). Post-trial Art. 39(a) appropriate procedure to repeat proceedings to reconstruct portions of a record of trial resulting from loss of recordings.

3. MJ may, any time until authentication, "reconsider any ruling other than one amounting to a finding of not guilty." R.C.M. 905(f).

B. Timing: MJ may call a post-trial session before the record is authenticated. CA may direct a post-trial session before taking initial action (or anytime if authorized by a reviewing authority).

C. Note that Art. 39(a) requires the accused's presence. *United States v. Caruth*, 6 M.J. 184 (C.M.A. 1979), (post-conviction, post-action hearing held without the accused was "improper and . . . not a part of the record of trial").

D. Limitations. Post-trial sessions cannot: increase the severity of a sentence unless the sentence is mandatory; reconsider a finding of not guilty as to a specification; reconsider a finding of not guilty as to a charge unless a finding of guilty to some other Article is supported by a finding as to a specification. *See United States v. Boland*, 22 M.J. 886 (A.C.M.R. 1986), *pet. denied*, 23 M.J. 400 (C.M.A. 1987).

VIII. PREPARATION OF RECORD OF TRIAL. ARTICLE 54, UCMJ; R.C.M. 1103.

A. Requires every court-martial to keep a record of proceedings.

B. *In a GCM*, TC shall, under the direction of the MJ, cause the ROT to be prepared and the reporters' notes, however compiled, to be retained. The ROT must be verbatim if:

1. Any part of the sentence exceeds six months confinement or other punishments which may be adjudged by a SPCM.

2. A BCD has been adjudged.

C. The rule and the Discussion list what must be included in or attached to the ROT. The rule is supplemented by AR 27-10, JAGMAN Sec. 0120, and AF Reg 111-1, para. 15-8.

D. For a special court-martial, if a BCD is adjudged, the transcript is verbatim.

E. Summary court-martial record is governed by R.C.M. 1305. *See* Appendix 15, MCM.

F. Acquittals: Still need a ROT (summarized).

G. What if a verbatim ROT cannot be prepared? *See* R.C.M. 1103(f). *But see United States v. Crowell, supra* (can reconstruct the record of trial to make it "verbatim.")

H. How verbatim is verbatim? No substantial omissions.

United States v. Seal, 38 M.J. 659 (A.C.M.R. 1993). Omission of videotape viewed by MJ before imposing sentence renders ROT "incomplete", resulting in reversal.

United States v. Maxwell, 2 M.J. 1155 (N.M.C.M.R. 1975). Two audiotapes inadvertently destroyed, resulting in loss of counsel's arguments, a brief Art. 39(a) on instructions and announcement of findings. All but DC argument reconstructed. "We do not view the absence of defense counsel's argument as a substantial omission to raise the presumption of prejudice. . . [and] no prejudice has been asserted."

United States v. Sylvester, 47 M.J. 390 (1998). ROT does not contain 1) R.C.M. 1105 / 1106 submissions from his CDC, and 2) request for deferment or the CA's action thereon. HELD: No error for failing to include the R.C.M. 1105 / 1106 submissions (CDC did not submit written matters, but made an oral presentation to the CA). CAAF refused to create a requirement that all such discussions be recorded or memorialized in the ROT, but made it clear they prefer written post-trial submissions. CAAF did find error, although harmless, for not including the deferment request and action in the ROT (the accused was released six days after the request).

United States v. Taite, No.9601736 (Army Ct. Crim. App., Nov. 14, 1997) (mem): ROT originally missing three defense exhibits (photo of post office (crime scene), and 2 stips of expected testimony not transcribed). Government recreated the stips, but could replicate photo. HELD: Non-verbatim ROT. If missing exhibit cannot be re-created, a description may be substituted pursuant to a certificate of correction (RCM 1103(b)(2)(D)(v)). In meantime, action set aside

to prepare substantially verbatim ROT for CA. If cannot do so, can only approve SPCM punishment.

I. Additional TC duties:

1. Correct number of copies of ROT specified.

2. Security classification of ROT.

3. Errata

J. Unless unreasonable delay will result, DC will be given opportunity to examine the ROT before authentication.

United States v. Bryant, 37 M.J. 668 (A.C.M.R. 1993). Review by DC before authentication is preferred, but will not result in return of record for new authentication absent showing of prejudice.

K. Videotaped ROT procedures: Authorized by R.C.M. Not authorized in AR 27-10.

IX. RECORDS OF TRIAL: AUTHENTICATION; SERVICE; LOSS; CORRECTION; FORWARDING. ARTICLE 54, UCMJ; R.C.M. 1104.

A. Authentication by MJ or judges in GCM or SPCM with adjudged BCD. Authentication IAW service regulations for SPCM (same as GCM in AR 27-10). Substitute authentication rules provided (*Cruz-Rijos* standard).

1. Dead, disabled or absent: only exceptions to MJ authentication requirement. Art. 54(a). *United States v. Cruz-Rijos*, 1 M.J. 429 (C.M.A. 1976).

2. TC may authenticate the ROT only if the military judge is genuinely unavailable for a lengthy period of time.

a. PCS to distant place may qualify as absence. *United States v. Lott*, 9 M.J. 70 (C.M.A. 1980).

b. An extended leave may be sufficient.

c. A statement of the reasons for substitute authentication should be included in the ROT.

Query: OCONUS judges on CONUS leave, TDY?

B. If more than one MJ, each must authenticate his portion. *United States v. Martinez*, 27 M.J. 730 (A.C.M.R. 1988).

C. TC shall cause a copy of ROT to be served on the accused after authentication. Substitute service rules provided.

1. UCMJ, art. 54(c), requires such service as soon as the ROT is authenticated.

2. In *Cruz-Rijos, supra*, COMA added the requirement that this be done well before CA takes action.

3. Substitute service on the DC is a permissible alternative. *See United States v. Derksen*, 24 M.J. 818 (A.C.M.R. 1987).

D. What to do if the authenticated ROT is lost? Produce a new ROT for authentication.

United States v. Garcia, 37 M.J. 621 (A.C.M.R. 1993): SJA prepared certification that all allied documents were true copies sufficient substitute for original documents.

E. Rules for correcting an authenticated ROT. Certificate of correction process.

F. The authenticated ROT will be forwarded for CA action or referred to the SJA for a recommendation before such action.

X. MATTERS SUBMITTED BY THE ACCUSED. ARTICLE 60, UCMJ; R.C.M. 1105.

"[W]hile the case is at the convening authority . . . the accused stands the greatest chance of being relieved from the consequences of a harsh finding or a severe sentence." *United States v. Dorsey*, 30 M.J. 1156 (A.C.M.R. 1990), quoting *United States v. Wilson*, 26 C.M.R. 3, 6 (C.M.A. 1958).

A. After being sentenced, the accused has the right to submit matters for the CA's consideration.

1. *See United States v. Davis*, 20 M.J. 1015 (A.C.M.R. 1985) (DC's failure to submit under R.C.M. 1105 and failure to mention under R.C.M. 1106(f) that MJ strongly recommended suspension of the BCD amounted to ineffective assistance). See R.C.M. 1106(d)(3()B) that now requires the SJA to bring to the CA's attention recommendations for clemency made on the record by the sentencing authority.

2. *See also United States v. Harris*, 30 M.J. 580 (A.C.M.R. 1990). DC is responsible for determining and gathering appropriate post-trial defense submissions; *United States v. Martinez*, 31 M.J. 524 (A.C.M.R. 1990). DC sent the accused one proposed R.C.M. 1105 submission. When the defense counsel received no response (accused alleged he never received it), DC submitted nothing; ineffective assistance found; *United States v. Tyson*, 44 M.J. 588 (N.M.Ct.Crim.App. 1996). Substitute counsel, appointed during *15 month* lapse between end of the SPCM and service of the PTR, failed to generate any post-trial matters (in part because accused failed to keep defense informed of his address). No government error, but action set aside because of possible IAC.

3. *United States v. Sylvester*, 47 M.J. 390 (1998): While oral submissions to CA by CDC not improper, CAAF expresses a preference for written submissions, at least to document oral presentation.

B. *Note 1998 change to R.C.M. 1105: Accused can submit anything, but the CA need only consider written submissions. The material may be anything that may reasonably tend to affect the CA action, including legal issues, excluded evidence, previously unavailable mitigation evidence, clemency recommendations. *See United States v. Davis*, 33 M.J. 13 (C.M.A. 1991).

Query: How much must he "consider" it? Read it entirely? Trust SJA's (realistically COJ's or TC's) summary? As DC's, what are your options here?

C. Time periods: GCM or SPCM—due on later of 10 days after service of PTR on BOTH DC and the accused and service of ROT on the accused. SCM—within 7 days of sentencing.

The failure to provide these time periods is error; however, the accused must make some showing that he would have submitted matters. *United States v. DeGrocco*, 23 M.J. 146 (C.M.A. 1986); *see also United States v. Sosebee*, 35 M.J. 892 (A.C.M.R. 1992) ("A staff judge advocate who discourages submissions to the convening authority after the thirty-day time limit but prior to action creates needless litigation and risks a remand from this Court" *Id*. at 894).

D. Waiver rules. The accused may waive the right to make a submission under R.C.M. 1105 by:

1. Failing to make a timely submission;

a. *United States v. Maners*, 37 M.J. 966 (A.C.M.R. 1993). CA not required to consider late submission, but may do so with view toward recalling and modifying earlier action.

b. *But see United States v. Carmack*, 37 M.J. 765 (A.C.M.R. 1993). Government "stuck and left holding the bag," when defense makes weak or tardy submission, even though no error or haste on part of the government.

2. By making a partial submission without expressly reserving in writing the right to additional submissions;

United States v. Scott, 39 M.J. 769 (A.C.M.R. 1994).

3. Filing an express, written waiver; or

4. Being AWOL so that service of the ROT on the accused is impossible and no counsel is qualified or available under R.C.M. 1106(f)(2) for service of the ROT. This circumstance only waives the right of submission during the ten day period after service of the ROT.

XI. RECOMMENDATION OF THE SJA OR LEGAL OFFICER AND DC SUBMISSION. ARTICLE 60, UCMJ; R.C.M. 1106.

A. Requires a written SJA recommendation on a GCM with any findings of guilty or a SPCM with a BCD adjudged before the CA takes action.

B. Disqualification of persons who have previously participated in the case.

1. Who is disqualified? The accuser, IO, court members, MJ, any TC, DC, or anyone who "has otherwise acted on behalf of the prosecution or defense." Article 46.

United States v. Johnson-Saunders, 48 M.J. 74 (1998). The Assistant TC, as the Acting Chief of Military Justice, wrote the SJA PTR. The SJA added only one line, indicating he had reviewed and concurred with the PTR. The DC did not object when served with the PTR. HELD: ATC disqualified to write the PTR. No waiver and plain error; returned for a new SJA PTR and action. The Court stated what may become the test for non-statutory disqualification: whether the trial participation of the person preparing the SJA PTR "would cause a disinterested observer to doubt the fairness of the post-trial proceedings."

United States v. Sorrell, 47 M.J. 432 (1998). CofJ wrote the SJA PTR. Dispute between the accused and the CofJ over whether the CofJ promised the accused he would recommend clemency if the accused testified against other soldiers (which he did). The Court avoids the issue; if there was error, it was harmless because the PTR recommended 6 months clemency, which the CA approved.

2. Also disqualified are the SJA who must review his own prior work (*United States v. Engle*, 1 M.J. 387 (C.M.A. 1976); or his own testimony in some cases (*United States v. Rice*, 33 M.J. 451 (C.M.A. 1991); *United States v. Choice*, 23 U.S.C.M.A. 329, 49 C.M.R. 663 (1975)). PTR insufficient if prepared by a disqualified person, even if filtered through and adopted by the SJA, *United States v. McCormick*, 34 M.J. 752 (N.M.C.M.R. 1992). R.C.M. 1106(b) discussion.

3. "Material factual dispute" or "legitimate factual controversy" required. *United States v. Lynch*, 39 M.J. 223, 228 (C.M.A. 1994*). See United States v. Bygrave*, 40 M.J. 839 (N.M.C.M.R. 1994) (PTR must come from one free from *any* connection with a controversy); *United States v. Edwards*, 45 M.J. 114 (1996). Legal officer (non-judge advocate) disqualified from preparing PTR because he had preferred the charges, interrogated accused, and acted as evidence custodian in case. Mere prior participation does not disqualify, but involvement "far beyond that of a nominal accuser" did so here. Waiver did not apply, because defense did not know at time it submitted post-trial matters.

4. Who is not disqualified? The SJA who has participated in obtaining immunity or clemency for a witness in the case. *United States v. Decker*, 15 M.J. 416 (C.M.A. 1983). Preparation of pretrial advice challenged at trial not automatically disqualifying; factual determination. *United States v. Caritativo*, 37 M.J. 175 (C.M.A. 1993).

5. How do you test for disqualification outside the scope of the rules? Do the officer's actions before or during trial create, or appear to create, a risk that the officer will be unable to evaluate objectively and impartially the evidence? *United States v. Newman*, 14 M.J. 474 (C.M.A. 1983). *See United States v. Kamyal*, 19 M.J. 802 (A.C.M.R. 1984) ("a substantial risk of prejudgment"). *United States v. Johnson-Saunders*, 48 M.J. 74 (1998): whether the involvement by a disqualified person in the PTR preparation "would cause a disinterested observer to doubt the fairness of the post-trial proceedings." TC prepares and SJA concurs; CAAF returns for new SJA PTR and action.

6. R.C.M. 1106(c). When the CA has no SJA. If SJA is disqualified (unable to evaluate objectively and impartially), ***CA*** must: Request assignment of another SJA, or forward record to another GCMCA. Make sure documentation is included in the record.

a. Informal agreement between SJAs is not sufficient. *United States v. Gavitt*, 37 M.J. 761 (A.C.M.R. 1993).

b. *United States v. Hall*, 39 M.J. 593 (A.C.M.R. 1994). SJA used incorrect procedure to obtain another SJA to perform post-trial functions. Court holds that failure to follow procedures can be waived.

c. Deputies don't write PTRs**.** *United States v. Crenshaw*, Army 9501222 (Army Ct. Crim. App. 1996) (unpub.). Fact that Deputy Staff Judge Advocate (DSJA) improperly signed PTR as "Deputy SJA," rather than "Acting SJA" did not require corrective action where PTR "contained nothing controversial" and where SJA signed addendum that adhered to DSJA's recommendation.

d. Who should author the SJA PTR? The SJA. *United States v. Finster*, 51 M.J. 185 (1999), where a non-qualified individual signed the SJA PTR the court concluded there was manifest prejudice.

C. Form and content: a *concise* written communication to assist in the exercise of command prerogative in acting on the sentence.

1. Findings and sentence. *United States v. Russett*, 40 M.J. 184 (C.M.A. 1994). Requirement for the SJA to comment on the multiplicity question arises when DC first raises the issue as part of the defense submission to the CA.

a. Accuracy most critical on charges and specs. *United States v. Diaz*, 40 M.J. 335 (C.M.A. 1994) (CMA disapproved findings on two specs omitted from PTR).

But see United States v. Ross, 44 M.J. 534, 536 (A.F. Ct.Crim.App. 1996) (improper dates for offense in PTR—July v. Sept.—not fatal when CA action reflected original, correct date of charge sheet; "we are reluctant to elevate 'typos' in dates to 'plain error'" *especially* when waived).

b. Some errors indulged, especially when defense does not notice or point out. *See, e.g., United States v. Royster*, No. 9400201 (Army Ct. Crim. App. 1995) (unpub.); *United States v. Bernier*, 42 M.J. 521 (C.G.C.M.R. 1994); *United States v. Zaptin*, 41 M.J. 977 (N.M Ct. Crim App. 1995).

2. Any clemency recommendations by the MJ or panel. R.C.M. 1106(d)(3)(b) [1995 change]. Do it here, not at the addendum stage.

3. Summary of accused's service record. *See United States v. Austin*, 34 M.J. 1225 (N.M.C.M.R. 1992).

a. *United States v. DeMerse*, 37 M.J. 488 (C.M.A. 1993). Failure to note Vietnam awards and decorations was plain error, requiring that action be set aside.

b. *United States v. Czekala*, 38 M.J. 566 (A.C.M.R. 1993). Error in omitting JSCM waived by failure to comment.

c. *United States v. McKinnon*, 38 M.J. 667 (A.C.M.R. 1993). Failure to comment on omission of several awards and decorations equals waiver.

d. *United States v. Thomas*, 39 M.J. 1078 (C.G.C.M.R. 1994). SJA not required to go beyond ROT and accused's service record in listing medals and awards in PTR.

e. *United States v. Perkins*, 40 M.J. 575 (N.M.C.M.R. 1994). SJA may rely on accused's official record in preparing PTR. No need to conduct inquiry into accuracy of record, particularly where accused does not question.

f. *United States v. Barnes*, 44 M.J. 680 (N.M.Ct.Crim.App. 1996). "There is no 'hard and fast rule' as to what errors or omissions in a post-trial recommendation so seriously affect the fairness and integrity of the proceedings as to require appellate relief." Accused, USMC staff sergeant with 14 years' service, no record of disciplinary problems, convicted of single use of marijuana. PTR failed to mention his Navy Commendation Medal, awarded for meritorious combat less than a year before trial. Court called the medal a "significant and worthy personal achievement. The failure to include these matters in the [PTR] deprives the [CA] of important information...and may well have affected the outcome of his sentence review. . . It is difficult to determine how a CA would have exercised his broad discretion if all of the information required by R.C.M. 1106(d)(3) had been available to him before he took his action." Here, the failure was prejudicial error, requiring new review and action (R&A). Defense did a good job on appeal in showing value of NAVCOM by offering Navy Instruction setting forth criteria for the award.

g. *United States v. Brewick,* 47 M.J. 730 (N.M. Ct. Crim. App. 1997). SJA PTR failed to list SW Asia service awards. HELD: Waiver by DC, and no plain error. Distinguishes *Demerse*, because those were combat awards, and old, which set Demerse apart from other soldiers (so few remaining on active duty).

4. Nature and duration of any pretrial restraint.

a. "The accused was under no restraint" or

b. "The accused served 67 days of pretrial confinement, which should be credited against his sentence to 8 years confinement."

5. CA's obligation under any pretrial agreement.

6. Specific recommendations as to action.

7. NOTHING ELSE!!!

8. Legal sufficiency need *not* be reviewed. Exceptions:

a. If the SJA deems it appropriate to take corrective action on findings or sentence, or

b. If the accused alleges a legal error in the R.C.M. 1105 submission.

United States v. Drayton, 40 M.J. 447 (C.M.A. 1994). Weighing of evidence supporting findings of guilt limited to evidence introduced at trial.

United States v. Haire, 40 M.J. 530 (C.G.C.M.R. 1994). Legal issues raised in 1105 submission not discussed in SJA recommendation; addressed for first time in addendum. No proof that addendum was served on DC. Action set aside.

9. Additional appropriate matters may be included in the recommendation even if taken from outside the record. R.C.M. 1106(d)(5*). See United States v. Due*, 21 M.J. 431 (C.M.A. 1986). *See also Drayton*, 40 M.J. 447.

D. Two additional tips:

1. Use a certificate of service when providing the defense with the PTR. *United States v. McClelland*, 25 M.J. 903 (A.C.M.R. 1988). This logic should be extended to service of the accused's copy of the SJA PTR. *See* R.C.M. 1106(f). *It is extremely self-defeating and short-sighted for the government not to follow this advice.*

2. List each enclosure (petitions for clemency, etc.) that goes to the CA on the PTR/addendum and / or have the convening authority initial and date all documents. *United States v. Hallums*, 26 M.J. 838 (A.C.M.R. 1988); *United States v. Craig*, 28 M.J. 321 (C.M.A. 1989).

Query: What if the CA forgets to initial one written submission, but initials all the others? Have you just given the DC evidence to argue that the CG "failed to consider" a written defense submission?

But see United States v. Blanch, 29 M.J. 672 (A.F.C.M.R. 1989) (government entitled to enhance "paper trail" and establish that accused's 1105 matters were forwarded to and considered by the CA) *and United*

States v. Joseph, 36 M.J. 846 (A.C.M.R. 1993) (SJA's affidavit established that matters submitted were considered by CA before action).

E. Errors in recommendation.

1. Corrected on appeal without return to CA for action. Appellate court tests for error. OR,

2. Return for new recommendation and new action. *See Craig*, at 325, "Since it is very difficult to determine how a convening authority would have exercised his broad discretion if the staff judge advocate had complied with R.C.M. 1106, a remand will usually be in order." (quoting *U.S. v. Hill*, 27 M.J. at 296). *See also United States v. Reed*, 33 M.J. 98 (C.M.A. 1992). *United States v. Hamilton*, 47 M.J. 32 (1997): "This court has often observed that the convening authority is an accused's last best hope for clemency [citation omitted]. Clemency is the heart of the convening authority's responsibility at that stage of a case. If an SJA gives faulty advice in this regard, the impact is particularly serious because no subsequent authority can adequately fix that mistake."

F. No recommendation is needed for total acquittals or other final terminations without findings. THIS NOW INCLUDES FINDINGS OF NOT GUILTY ONLY BY REASON OF LACK OF MENTAL RESPONSIBILITY. *See* R.C.M. 1106(e).

G. Service of PTR on DC and the accused. R.C.M. 1106(f)(1).

1. Before forwarding the recommendation and the ROT to the CA for action, the SJA or legal officer shall cause a copy of the PTR to be served on counsel for the accused. A separate copy will be served on the accused.

United States v. Hickok, 45 M.J. 142 (1996). Failure to serve PTR on counsel is prejudicial error, even though counsel submitted matters before authentication of record and service of PTR. Original counsel PCSd, new counsel never appointed, and OSJA never tried to serve PTR. CAAF finds accused "was unrepresented in law and in fact" during this stage. Fact that R.C.M. 1105 clemency package was submitted at an early stage (and, all conceded, considered by CA at action) cannot compensate for the separate post-trial right to *respond* to the PTR under R.C.M. 1106. *Although*

normally submitted simultaneously, R.C.M. 1105 and R.C.M. 1106 submissions serve different purposes.

2. If it is impracticable to serve the accused for reasons including but not limited to the transfer of the accused to a distant place, his AWOL, military exigency, or if the accused so requests on the record at court or in writing, the accused's copy shall be forwarded to the defense counsel. A statement shall be attached to the record explaining why the accused was not served personally.

   a. *United States v. Ayala*, 38 M.J. 633 (A.C.M.R. 1993). Substitute service of ROT and PTR on DC authorized where accused is confined some distance away.

   b. Mailing of recommendation is not impracticable where all parties are located in CONUS and the accused has provided a current mailing address. *United States v. Smith*, 37 M.J. 583 (N.M.C.M.R. 1993).

   c. *United States v. Lowery*, 37 M.J. 1038 (A.C.M.R. 1993). Real issue in this area is whether accused and defense counsel have opportunity to submit post-trial matters.

   d. *United States v. Ray*, 37 M.J. 1053 (N.M.C.M.R. 1993). Mere failure to serve does not warrant relief; accused did not offer evidence to rebut presumption that SJA had properly executed duties, did not submit matters that would have been submitted to CA, and did not assert any inaccuracies in the recommendation.

3. The accused may designate at trial *which counsel* shall be served with the PTR or may designate such counsel in writing to the SJA before the PTR is served. Absent such a designation, the priority for service is: Civilian counsel, individual military counsel and then detailed counsel.

   If no civilian counsel exists and all military counsel have been relieved or are not reasonably available, substitute counsel shall be detailed by an appropriate authority. AR 27-10, para. 6-9 says the Chief, USATDS, or his delegee will detail defense counsel. *But see United States v. Johnson*, 26 M.J. 509 (A.C.M.R. 1988).

a. Substitution of counsel problems. R.C.M. 1106(f)(2).

(1) *United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978) (substituted counsel must form attorney-client relationship with the accused; absent extraordinary circumstances, only the accused may terminate an existing relationship). *See also United States v. Miller*, 45 M.J. 149 (1996). Substitute defense counsel's failure to formally establish attorney-client relationship with accused found harmless, despite substitute counsel's failure to consult accused or submit clemency package. Detailed counsel (who later ETSd) had submitted clemency materials before service of PTR, and government was not on any reasonable notice that substitute counsel and accused failed to enter attorney-client relationship. In such circumstances, test for prejudice.

(2) *United States v. Howard*, 47 M.J. 104 (1997). Rejecting an invitation to overrule *Miller*, the CAAF restates that failure of the substitute DC to contact the client post-trial will be tested for prejudice. "Prejudice" does not require the accused to show that such contact and the resulting submission would have resulted I clemency; it only requires a showing that the accused would have been able to submit something to counter the SJA's PTR.

(3) *United States v. Antonio*, 20 M.J. 828 (A.C.M.R. 1985) (accused may waive the right to his former counsel by his acceptance of substitute counsel and his assent to their representation).

(4) *United States v. Edwards*, 9 M.J. 94 (C.M.A. 1980) (permission of the accused not found in record); *United States v. Lolagne*, 11 M.J. 556 (A.C.M.R. 1981) (accused's permission presumed under the circumstances).

(5) *United States v. Hood*, 47 M.J. 95 (1997). Even if the substitute counsel does form the required attorney-client relationship, failure to discuss the accused's clemency packet with him prior to submission is deficient performance under the first prong of the *Strickland v. Washington* analysis.

(6) *United States v. Johnston,* 51 M.J. 185 (1999), the convening authority must insure that the accused is represented during post-trial. Submission of R.C.M. 1105 and 1106 matters is considered to be a critical point in the criminal proceedings against an accused.

b. If the accused alleges ineffective assistance of counsel (IAC) after trial, that counsel cannot be the one who is served with the PTR.

(1) *United States v. Cornelious*, 41 M.J. 397 (1995) (Government on notice of likely IAC. Court remanded to determine whether accused substantially prejudiced).

(2) *United States v. Carter* 40 M.J. 102 (C.M.A. 1994). No conflict exists where DC is unaware of allegations.

(3) *United States v. Alomarestrada*, 39 M.J. 1068 (A.C.M.R. 1994) (dissatisfaction with outcome of trial does not always equal attack on competence of counsel requiring appointment of substitute counsel).

(4) *United States v. Sombolay*, 37 M.J. 647 (A.C.M.R. 1993) (substitute counsel not required where allegations of ineffective assistance are made after submission of response to PTR).

(5) *United States v. Leaver*, 36 M.J. 133 (C.M.A. 1992).

4. Upon request, a copy of the ROT shall be provided for use by DC. DC should include this boilerplate language in the Post-Trial and Appellate Rights Forms.

H. Defense Counsel Submission. R.C.M. 1106(f)(4).

"Counsel for the accused may submit, in writing, corrections or rebuttal to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and may comment on any other matter."

1. *United States v. Goode*, 1 M.J. 3 (C.M.A. 1975), required service of PTR on the DC before the CA can take action. DC's failure to object to errors in PTR response normally waives such errors. *See also United States v. Narine*, 14 M.J. 55 (C.M.A. 1982).

2. Response due within 10 days of service of PTR on both DC and accused and service of authenticated ROT on accused, whichever is later.

3. SJA may approve delay for 1105 (not 1106) matters for up to 20 days; only CA may disapprove.

4. Failure to comment "shall" waive any error in the PTR but plain error. *See United States v. Smart*, 21 M.J. 15 (C.M.A. 1985) (DC's failure to object in time to SJA's failure to serve the PTR IAW *Goode* waived any objections); *United States v. Lugo*, 32 M.J. 719 (C.G.C.M.R. 1991); and *United States v. Huffman*, 25 M.J. 758 (N.M.C.M.R. 1987) (plain error where findings and sentence were erroneously reported).

I. Staff Judge Advocate Addendum. R.C.M. 1106(f)(7).

"The staff judge advocate or legal officer may supplement the recommendation after the accused and counsel for the accused have been served with the recommendation and given an opportunity to respond."

1. Must address allegations of legal error. Rationale not required; "I have considered the defense allegation of legal error regarding _____. I disagree that this was legal error. In my opinion, no corrective action is necessary." *See United States v. McKinley,* 48 M.J. 280 (1998) and Judge Cox's statement in response to an allegation of legal error.

a. *See United States v. Keck*, 22 M.J. 755 (N.M.C.M.R. 1986). *See also United States v. Broussard*, 35 M.J. 665 (A.C.M.R. 1992) (addendum stating "I have carefully considered the enclosed matters and, in my opinion, corrective action with respect to the findings and sentence is not warranted" was an adequate statement of disagreement with the assertions of accused). Need give no rationale or analysis – mere disagreement and comment on the need for corrective action sufficient.

b. *United States v. Welker*, 44 M.J. 85 (1996). Although error for SJA not to respond to defense assertions of legal errors made in post-trial submissions, CAAF looked to record and determined there was no error. Consequently, held no prejudice to the accused. Reaffirms principle that statement of agreement or disagreement, without statement of rationale, is OK. Court will test for prejudice. When (as here) the court finds no trial error, it will find no prejudice. *See also United States v. Jones*, 44 M.J. 242 (1996) (comments on preparation of ROT were "trivial").

c. *United States v. Sojfer*, 44 M.J. 603 (N.M.Ct.Crim.App. 1996). Seven page addendum recited alleged errors and said, "*My recommendation remains unchanged: I recommend that you take action to approve the sentence as adjudged*... He [SJA] made no other comment regarding the merit of the assigned errors." Government argued that "only inference...is that the [SJA] disagreed with all of the errors that were raised. We agree."

2. Ambiguous, unclear defense submission. If the submission arguably alleges a legal error in the trial, the SJA must respond under R.C.M. 1106 and state whether corrective action needed.

a. *United States v. Hill*, 27 M.J. 293 (C.M.A. 1988);

b. *United States v. Moore*, 27 M.J. 656 (A.C.M.R. 1988).

c. *United States v. Williams-Oatman*, 38 M.J. 602 (A.C.M.R. 1993) ("consideration of inadmissible evidence" is sufficient allegation of legal error).

3. 1995 MCM change codifies case law requiring that addenda that contain "new matter" must be served on the defense. R.C.M. 1106(f)(7).

a. *United States v. Leal*, 44 M.J. 235 (1996). If the additional information is not part of the record, *i.e.*, transcript, consider it to be new matter. Not enough that it's "between the blue covers," because that would permit government to highlight and smuggle to CA evidence offered but not admitted. Here, the addendum referred to a letter of reprimand; the failure to serve the addendum required a new R&A by a new CA.

b. *United States v. Cook*, 43 M.J. 829 (A.F. Ct. Crim. App. 1996). In two post-trial memos SJA advised CA about the MJ's qualifications, experience, likelihood of accused's waiving administrative separation board, and minimizing effects of BCD. Court disapproved BCD because all of this was obviously outside the record and should have been served on accused with opportunity to comment. Remedy -- set aside BCD.

c. *United States v. Norment*, 34 M.J. 224 (C.M.A. 1992).

d. *United States v. Harris*, 43 M.J. 3 (Army Ct. Crim. App. 1995) (addendum referred first time to an Art. 15; new review and action required).

e. *United States v. Sliney*, No. 9400011 (Army Ct. Crim. App. 1995) (inclusion of letters from victim and victim-witness liaison required re-service; new action required). *Accord United States v. Haire*, 40 M.J. 530 (C.G.C.M.R. 1994).

f. *United States v. McCrimmons*, 39 M.J. 867 (N.M.C.M.R. 1994). Reference in addendum was to 3 thefts, which formed basis for court-martial ("demonstrated by his past behavior that he is not trustworthy") not "new matter."

g. *United States v. Heirs*, 29 M.J. 68 (C.M.A. 1989). The SJA erred by erroneously advising the CA in the addendum to the PTR that Heirs' admissions during the rejected providence inquiry *could* be used to support the findings of guilty once the accused challenged the sufficiency of the evidence post-trial.

h. *United States v. Trosper,* 47 MJ 728 (N.M. Ct. Crim. App. 1997) CSM's memo to CG that he gave little weight to accused's alleged remorse was not served on DC. Court finds the memo did not constitute new matter, but simply a fair comment on the offense, and was not from outside the record. Even if new matter, NMCCA relies on the requirement from *United States v. Chatman,* 46 M.J. 321 (1997) that appellant demonstrate what he would have submitted to deny, counter, or explain the new matter. Appellate DC failed to do so, by simply repeating the same argument trial DC submitted during clemency.

i. *United States v. Cornwell,* 49 M.J. 491 (1998). CG asks the SJA whether the command supports the accused's request for clemency. The SJA calls the accused's commanders, then verbally relays their recommendations against clemency for the accused to the CG. The SJA then does an MFR to that effect, attaching it to the ROT. The CAAF says the SJA's advice to the CG is not new matter in the addendum under R.C.M 1106(f)(7), but may be matter of which the accused's is not charged with knowledge, under R.C.M. 1107(b)(3)(B)(iii). Again, even if such, CAAF says the defense did not indicated what they would have done in response, so *Chatman* standard not met.

j. *United States v. Anderson,* 53 M.J. ____ (2000). The submission of a note from the chief of staff to the convening authority which states "Lucky he didn't kill the SSgt. He's a thug, Sir." was new matter.

4. Addendum should remind CA of the requirement to review the accused's post-trial submissions. *United States v. Pelletier*, 31 M.J. 501 (A.F.C.M.R. 1990); *United States v. Ericson*, 37 M.J. 1011 (A.C.M.R. 1993).

a. *United States v. Foy*, 30 M.J. 664 (A.F.C.M.R. 1990). Appellate courts will presume post-trial regularity if the SJA prepares an addendum that:

(1) Informs the CA that the accused submitted matter and that it is attached;

(2) Informs the CA that he *must consider* the accused's submissions; and

(3) Lists the attachments.

J. What if the accused submitted matters but there is no addendum?

United States v. Godreau, 31 M.J. 809 (A.F.C.M.R. 1990). Two conditions for a presumption of post-trial regularity:

1. There must be a statement in the PTR informing the CA that he must consider the accused's submissions.

2. There must be some means of determining that the CA in fact considered all post-trial materials submitted by the accused. Ideal: list attachments, and CA initials and dates all submissions in a "clearly indicated location."

If *Foy* requirements are not met, or if no addendum and the two *Godreau* conditions are not met, the government must submit an affidavit from the CA. *See United States v. Joseph*, 36 M.J. 846 (A.C.M.R. 1993).

"The best way to avoid a *Craig* problem is to prepare an addendum using the guidance in *Foy* and *Pelletier* to insure compliance with *Craig* and UCMJ, article 60(c). If this method is used, there will be no need to have the convening authority initial submissions or prepare an affidavit." *Godreau* at 812.

United States v. Buller, 46 M.J. 467 at 469, n.4 (1997): "[L]itigation can be avoided through the relatively simple process of serving the addendum on the accused in all cases, regardless whether it contains 'new matter.'"

K. Common PTR, addendum errors:

1. Inaccurately reflects charges and specs (especially dismissals, consolidations).

2. Inaccurately reflect maximum punishment.

3. Omit, misapply pretrial confinement (*Allen*, R.C.M. 305(k) credit).

4. Omit, misapply Art. 15 (*Pierce*) credit.

5. Approve greater than 2/3 forfeitures for periods of no confinement.

6. Extraneous (and often erroneous) information – *Stick to the Basics!!*

XII. ACTION BY CONVENING AUTHORITY, UCMJ, ART 6; R.C.M. 1107.

A. Who may act: The convening authority. *See United States v. Delp*, 31 M.J. 645 (A.F.C.M.R. 1990) (the person who convened the court).

1. *United States v. Solnick*, 39 M.J. 930 (N.M.C.M.R. 1994). Rule requiring CA to take action unless impractical requires that there be practical reason for transferring case from control of officer who convened court to superior after trial, and precludes superior from plucking case out of hand of CA for improper reason.

2. *United States v. Rivera-Cintron*, 29 M.J. 757 (A.C.M.R. 1989). Acting Commander not disqualified from taking action in case even though he had been initially detailed to sit on accused's panel.

3. *United States v. Cortes*, 29 M.J. 946 (A.C.M.R.), *pet. denied* 31 M.J. 420 (C.M.A. 1990). After considering the Assistant Division Commander's affidavit, the court determines that the acting CA, who approved accused's sentence as adjudged, was not affected by the editorial written by the CA about the "slime that lives among us."

4. *United States v. Vith*, 34 M.J. 277 (C.M.A. 1992). Commander did not lose impartiality by being exposed to three pages of accused's immunized testimony in companion case; commander had no personal interest in the case and there was no appearance of vindictiveness.

B. CA not automatically disqualified simply because prior action set aside.

United States v. Ralbovsky, 32 M.J. 921 (A.F.C.M.R. 1991). Test: Does CA have an other than official interest or was he a member of the court-martial?

C. General considerations.

1. Not required to review for legal correctness or factual sufficiency. Action is within sole discretion of CA as a command prerogative.

2. Cannot act before R.C.M. 1105(c) time periods have expired or submissions have been waived.

3. *Must consider*:

a. Result of trial,

b. SJA recommendation, and

c. Accused's written submissions.

d. How "detailed" must the consideration be? "Congress intended to rely on the good faith of the convening authority in deciding how detailed his 'consideration' must be." *United States v. Davis*, 33 M.J. 13 (C.M.A. 1991).

e. Failure to consider two letters submitted by DC requires new review and action. *United States v. Dvonch*, 44 M.J. 531, 533 (A.F. Ct. Crim. App. 1996).

f. *United States v. Mooney*, Army 9500238 (Army Ct. Crim. App. June. 10, 1996) (memo op on reconsideration). Court determined that fax received "in sufficient time to forward it . . . through the Staff Judge Advocate to the convening authority." "[A]ppellant's articulate and well-reasoned R.C.M. 1105 clemency letter *through no fault of his own* was not submitted to the convening authority on time. We do not have sufficient information to determine [whose fault it was]..as our function is...not to allocate blame. The quality of the clemency letter...gives rise to the reasonable possibility that a [CA] would grant clemency based upon it. Thus...the appellant has been prejudiced..." (emphasis in original). Set aside CA action, return to TJAG for new action.

Moral of story: Even if government not at fault, accused may get new R&A. Send back to CA if record not yet forwarded for appeal.

g. *United States v. Roemhildt*, 37 M.J. 608 (A.C.M.R. 1993). CA and SJA not required to affirmatively state they have considered recommendation of FACMT. *Accord United States v. Corcoran*, 40 M.J. 478 (C.M.A. 1994).

h. *United States v. Ericson*, 37 M.J. 1011 (A.C.M.R. 1993). There must be *some tangible proof* that CA *saw and considered* clemency materials before taking action.

4. *May consider*: Record of trial, personnel records of accused, and anything deemed appropriate, but if adverse to accused and from outside the record, then accused must be given an opportunity to rebut. *See United States v. Mann*, 22 M.J. 279 (C.M.A. 1986); *United States v. Carr*, 18 M.J. 297 (C.M.A. 1984).

5. CA need not meet with accused -- or anyone else. *United States v. Haire*, 44 M.J. 520 (C.G.Ct.Crim.App. 1996). CA not required to give personal appearance to accused. Even truer now, as this case relied on *Davis*, in which court had held that CA must consider videotape (no longer good law in light of 1996 statutory change). Requirement to "consider" only pertains to "'inanimate' matter that can be appended to a clemency request. We specifically reject the contention that a petitioner for clemency has a non-discretionary right to personally appear before the convening authority."

6. No action on not guilty findings.

7. No action approving a sentence of an accused who lacks the capacity to understand or cooperate in post-trial proceedings.

D. Action on findings not required but permissible.

E. Action on sentence must:

1. *explicitly state approval or disapproval*; *United States v. Schiaffo*, 43 M.J. 835 (Army Ct. Crim. App. 1996). Action did not expressly approve the BCD, though it referred to it in "except for" executing language. Sent back to CA for new action. Note the problem:

> "In the case of ... only so much of the sentence as provides for reduction to Private E1, forfeiture of $569.00 pay per month for six months, and confinement for four months is approved and, *except for the part of the sentencing extending to bad-conduct discharge,* will be executed."
>
> Common Problem: *See also United States v. Reilly*, No. 9701756 (Army Ct. Crim. App., June 12, 1998) and *United States v. Scott*, No. 9601465 (Army Ct. Crim. App., June 12, 1998). Both cases involved errors by the SJA in preparing the CA's action. While the SJA PTR correctly said the CA could approve TF, E1, 15 months and a BCD, the CA's action said "only so much of the sentence as provided for reduction to E1, TF and confinement for 15 months is approved, *and except that portion extending to the Bad Conduct Discharge*, shall be executed." Promulgating order had same ambiguity. HELD: Returned to CA for new unambiguous action.

2. *cannot increase adjudged sentence*; *United States v. Jennings*, 44 M.J. 658 (C.G.Ct.Crim.App. 1996). MJ announced five month sentence, but did not expressly include pretrial confinement (PTC) credit. After issue raised, MJ said on record that he had “considered” the 8 days PTC before announcing the sentence, and the SJA recommended that the CA approve the sentence as adjudged (he did).

"Further clarification by the judge was needed to dispel the ambiguity...created by his remarks." SJA "should have returned the record to the judge for clarification pursuant to R.C.M. 1009(d), rather than attempt to dispel the ambiguity of intent himself." "*In any event, there is no authority whatsoever for a staff judge advocate to make an upward interpretation of the sentence, as was done in this case."*

3. *may disapprove all or any part* of a sentence for any or no reason. *See United States v. Bono*, 26 M.J. 240 (C.M.A. 1988) (reduction in sentence saved the case when DC found to be ineffective during sentencing).

United States v. Smith, 47 M.J. 630 (Army Ct. Crim. App. 1997). At a GCM, the accused was sentenced to TF, but no confinement. Neither the DC nor the accused submitted a request for waiver or deferment, nor complained about the sentence. Accused did not go on voluntary excess leave. Fourteen days after sentence, TF went into effect. At action, the CA tried to suspend all forfeitures beyond 2/3 until the accused was placed on involuntary excess leave. HELD: The CA's attempt to suspend was invalid, because the TF was executed (at 14 days) prior to the attempted suspension. The Army Court found the time the accused spent in the unit (5 Jul to 19 Aug) without pay was cruel and unusual punishment; and directed the accused be restored 1/3 of her pay. *See also United States v. Warner*, 25 M.J. 64 (C.M.A. 1987).

4. *may reduce a mandatory sentence adjudged*.

5. *change a punishment* to one of a different nature if less severe. *United States v. Carter*, 45 M.J. 168 (1996). CA lawfully converted panel's BCD and 12 month sentence to 24 *additional* months' confinement and no BCD, acting in response to request that accused be permitted to retire. Commutation must be clement, "not 'merely a substitution'" of sentences, but clearly was proper here; BCD was disapproved and accused got his wish to retire, and where, importantly, he neither set any conditions on the commutation (*e.g.*, setting a cap on confinement he was willing to endure), nor protested the commutation in his submission to the CA. But consider the Discussion to R.C.M. 1107(d)(1) that a BCD can be converted to 6 months of confinement.

6. *suspend punishment*. *United States v. Barraza*, 44 M.J. 622 (N.M.Ct.Crim.App. 1996). Court approved CA's reduction of confinement time from PTA-required 46 months (suspended for 12 months) to 14 months, 6 days (suspended for 36 months). Sentence was for 10 years. Court emphasized the "sole discretionary power" of CA to approve or change punishments "as long as the severity of the punishment is not increased." (citing R.C.M. 1107(d)(1)). Also significant that approved confinement was 22 months less than accused sought in his clemency petition.

F. Original dated signed action must be included in the record. *See* R.C.M. 1107(f)(1) and 1103(b)(2)D)(iv).

G. Contents of action. *See* Appendix 16, MCM, Forms for Actions.

H. If confinement is ordered executed, "the convening authority shall designate the place . . . in the action, unless otherwise prescribed by the Secretary concerned."

1. AR 27-10 (para. 5-27) says do not designate a place of confinement. AR 190-47 controls.

2. JAGMAN Section 0123e "*Designation of places of confinement*. The convening authority of a court-martial sentencing an accused to confinement is a competent authority to designate the place of temporary custody or confinement of naval prisoners."

3. AF Reg 111-1, para. 15-10a. "Designated Confinement. Normally, a place of confinement . . . will be named in the . . .[CA's] action."

I. What if an error is discovered after action is taken? R.C.M. 1107(f)(2) provides that:

1. BEFORE publication OR official notice to the accused, CA may recall and modify any aspect of action (including modification less favorable to the accused, such as adding the discharge approval language, ala *Schiaffo* above).

2. IF EITHER publication or official notice has occurred, CA may only make changes that do not result in action less favorable to the accused.

3. CA must personally sign the modified action.

J. Action potpourri.

1. CA must direct in post-trial action award of any R.C.M. 305(k) credit for illegal pretrial confinement. In the interest of discouraging deliberate or negligent disregard of the rules, CMA returns action to CA for correction. *United States v. Stanford*, 37 M.J. 388 (C.M.A. 1993).

2. Message, Headquarters, Department of Army, DAJA-CL, subject: Sentence Credit (221600Z June 94). Effective 1 Aug. 94, CA actions will state number of days of sentence credit for all types of pretrial confinement.

3. *McCray v. Grande*, 38 M.J. 657 (A.C.M.R. 1993). Sentence, for purposes of commutation, begins to run on date announced.

4. *United States v. Foster*, 40 M.J. 552 (A.C.M.R. 1994). Court does not have to treat ambiguous action ($214 per month) as forfeiture for one month; may return to CA for clarification of intent.

5. *United States v. Muirhead,* 48 MJ 527 (NMCCA 1998). D sentenced to "forfeit all pay and allowances, which is $854.40 for 2 years," and CA approves the same. HELD: Ambiguous sentence. CA under RCM 1107(d)(1) can return case to court for clarification of ambiguous sentence, if he does not, he can only approve a sentence no more severe than the unambiguous portion. Rather than return to CA court simply affirms unambiguous dollar amount.

XIII. POST-TRIAL PROCESSING TIME.

A. From sentence to action:

1. The old rule: *Dunlap v. Convening Authority*, 48 C.M.R. 751 (C.M.A. 1974) (When an accused is continuously under restraint after trial, the convening authority must take action within 90 days of the end of trial or a presumption of prejudice arises).

2. The current rule: test for prejudice. *United States v. Banks*, 7 M.J. 92 (C.M.A. 1976).

   a. *United States v. Williams*, 42 M.J. 791 (N.M.Ct.Crim.App. 1995). Record lost for 5 years after trial, so accused's BCD never executed and he served the 50 days provided in the PTA. Main argument: lost employment opportunities because his company could not bid for government contracts given that he was still on active duty (appellate leave). Court found this insufficient, especially in light of his plea of guilty, but did grant sentence relief, refusing to affirm BCD. Chides USN severely, saying not result of "inexperienced sailors or Marines" but "the inattention, dereliction, or incompetence of legally trained personnel." Suggests that someone "be held accountable for the delays" under Art. 98.

   b. *United States v. Jenkins*, 38 M.J. 287 (C.M.A. 1993). Claims of lost employment opportunity, inability to participate in state programs for home buying by veterans, and lost accrued leave, all resulting from post-trial delay not sufficient to warrant relief from findings and sentence.

   c. *United States v. Giroux*, 37 M.J. 553 (C.M.A. 1993). Court cautions supervisory judge advocates to avoid over-emphasizing the importance of court-martial processing time to their SJAs (parties entered in post-trial agreement whereby accused would accept responsibility for post-trial processing time in exchange for clemency from CA).

   d. *United States v. Richter*, 37 M.J. 615 (A.C.M.R. 1993). Delay of five months from authentication to action did not prejudice accused.

e. *United States v. Dupree*, 37 M.J. 1089 (N.M.C.M.R. 1993). Delay before CA action warrants relief only if delay is unjustified and inordinate, and there is some demonstrable prejudice to the accused.

3. *United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000), the Army Court has come up with a new method of dealing with post-trial processing time delay. In Collazo the court granted the appellant 4 months off of his confinement because the Government did not exercise due diligence in processing the record of trial. The court expressly found no prejudice.

4. Reality: Clerk of Court will inquire after 90 days.

XIV. SUSPENSION OF SENTENCE; REMISSION. ART. 71, UCMJ; R.C.M. 1108.

A. The rule requires the conditions of any suspension to be specified in writing, served on the accused, and receipted for by the probationer. *United States v. Myrick*, 24 M.J. 792 (A.C.M.R. 1987) (there must be substantial compliance with RCM 1108). *See*:

1. AR 27-10, para. 5-29;

2. JAGMAN, section 0129; and

3. AF Reg 111-1, para. 15-19.

B. Power of the CA to create conditions.

1. *United States v. Cowan*, 34 M.J. 258 (C.M.A. 1992). The accused asked the CA for a method by which she could serve her confinement and still support her six-year-old child. CA approved the sentence, but suspended for one year confinement in excess of six months and forfeitures in excess of $724.20, suspension of forfeitures conditioned upon:

a. The initiation of an allotment payable to the daughter's guardian of $278.40, for the benefit of the girl; and

b. The maintenance of the allotment during the time the accused is entitled to receive pay and allowances.

HELD**:** Permissible. *Note*. Court recognizes inherent problems; recommend careful use of such actions.

2. *United States v. Schneider*, 34 M.J. 639 (A.C.M.R. 1992). The accused asked for assistance in supporting his dependents. Court upheld CA's suspension of forfeitures in excess of $400.00 on conditions that the accused:

a. Continue to claim on W-4, as long as he can legitimately do so, single with 2 dependents.

b. Initiate and maintain allotment to be paid directly to spouse in amount of $2,500.

C. Period of suspension must be reasonable, conditions must not be "open-ended" or "unachievable."

1. Limited by AR 27-10, paragraph 5-31, on a sliding scale from to 3 months in a SCM to 2 years in a GCM.

2. *United States v. Spriggs*, 40 M.J. 158 (C.M.A. 1994). Uncertain and open-ended period of time required to fulfill one of the conditions (self-financed sex offender program) made the period of suspension of the discharge and reduction in grade "unreasonably long." Court, especially Judge Cox, signals approval for parties' "creative" and "compassionate" efforts.

3. *United States v. Ratliff*, 42 M.J. 797 (N.M. Ct.Crim.App. 1995) Eleven years probation not unreasonably long under the circumstances (though would be barred in the Army by AR 27-10).

4. Suspension of period of confinement in conjunction with approved discharge should coincide with serving of unsuspended portion of confinement. *United States v. Koppen*, 39 M.J. 897 (A.C.M.R. 1994).

5. *United States v. Wendlandt*, 39 M.J. 810 (A.C.M.R. 1994). Directing that suspension period begin on date later than action is not per se improper.

XV. VACATION OF SUSPENSION OF SENTENCE. ART. 72, UCMJ; R.C.M. 1109.

A. 1998 Change to R.C.M. 1109.

B. The rule sets forth the procedural and substantive requirements for vacating a suspended sentence. It authorizes immediate confinement pending the vacation proceedings, if under a suspended sentence to confinement. *See* Appendix 18, MCM.

C. *United States v. Connell*, 42 M.J. 462 (1995), *pet. for cert. pending*, sets out the history of the procedure and defends it well; note Cox concurrence.

XVI. WAIVER OR WITHDRAWAL OF APPELLATE REVIEW. ART. 61, UCMJ; R.C.M. 1110.

A. After any GCM, except one in which the approved sentence includes death, and after a special court-martial in which the approved sentence includes a BCD the accused may elect to waive appellate review.

> Waiver. The accused may sign a waiver of appellate review any time after the sentence is announced. The waiver may be filed only within 10 days after the accused or defense counsel is served with a copy of the action under R.C.M. 1107(h). On written application of the accused, the CA may extend this period for good cause, for not more than 30 days. *See* RCM 1110(f)(1):

B. The accused has the right to *consult* with counsel before submitting a waiver or withdrawal.

1. Waiver.

a. Counsel who represented the accused at the court-martial.

b. Associate counsel.

c. Substitute counsel.

2. Withdrawal.

a. Appellate defense counsel.

b. Associate defense counsel.

c. Detailed counsel if no appellate defense counsel has been assigned.

d. Civilian counsel.

C. Procedure.

1. Must be in writing, attached to ROT, and filed with the CA.

2. TDS SOP requires a 72 hour "cooling off" period; recontact after initial request to waive / withdraw. Written statement must include: statement that accused and counsel have discussed accused's appellate rights and the effect of waiver or withdrawal on those rights; that accused understands these matters; that the waiver or withdrawal is submitted voluntarily; signature of accused and counsel. *See* Appendix 19 and 20, MCM.

3. The accused may only *file* a waiver within 10 days after he or DC is served with a copy of the action.

United States v. Smith , 44 M.J. 387 (1996). May not validly waive appellate review, under Art. 61, UCMJ, before CA takes initial action in a case. Citing, *inter alia*, *United States v. Hernandez*, 33 M.J. 145 (C.M.A.

1991), court says that Art. 61(a) permits such waiver "within 10 days after the action...is served on the accused or on defense counsel." R.C.M. 1110(f) must be read in this context. Clearly the R.C.M. cannot supersede a statute, but careful reading of the R.C.M. reveals that it may be signed "at any time after the sentence is announced" but "must be *filed* within 10 days after" service of the action (emphasis added).

4. The accused may file a *withdrawal* at any time before appellate review is completed.

5. Once filed in substantial compliance with the rules, the waiver or withdrawal may *not* be revoked.

   a. *United States v. Walker*, 34 M.J. 317 (C.M.A. 1992). Documents purporting to withdraw accused's appeal request were invalid attempt to waive appellate review prior to CA's action.

   b. *United States v. Smith*, 34 M.J. 247 (C.M.A. 1992) (Waiver of appellate representation 58 days before action by CA was tantamount to waiver of appellate review; therefore, was premature and without effect).

   c. *Clay v. Woodmansee*, 29 M.J. 663 (A.C.M.R. 1989). Accused's waiver of appellate review was null as it was the result of the government's promise of clemency.

XVII. DISPOSITION OF RECORD OF TRIAL AFTER ACTION. R.C.M. 1111.

A. General Courts-Martial. ROT and CA's action will be sent to the office of The Judge Advocate General.

B. Special Courts-Martial with an approved BCD will be sent to OTJAG.

C. SPCM with an approved BCD (and waiver of appeal). Record and action will be forwarded to a judge advocate for review (R.C.M. 1112).

D. Other special courts-martial and summary courts-martial will be reviewed by a judge advocate under R.C.M. 1112.

XVIII. REVIEW BY A JUDGE ADVOCATE. ART. 64, UCMJ; R.C.M. 1112.

A. A judge advocate shall review, under service regulations, each case not reviewed under Article 66. AR 27-10, para. 5-35*b* says this review may be done either by a JA in the Office of the SJA of the convening command or by a JA otherwise under the technical supervision of the SJA.

B. No review required for total acquittal or where CA disapproved all findings of guilty.

C. Disqualification of reviewer for prior participation in case.

D. The review shall be in writing. It shall contain conclusions as to whether the court-martial has jurisdiction over the accused and the offenses, each specification states an offense, and the sentence is legal. The review must respond to each allegation of error made by the accused under RCM 1105, 1106(f), or filed with the reviewing officer directly. If action on the ROT is required by the CA, a recommendation as to the appropriate action and an opinion as to whether corrective action is required must be included.

E. The ROT shall be sent to the CA for supplementary action if (1) the reviewer recommends corrective action, (2) the sentence includes dismissal, a DD or BCD or CHL in excess of six months, or (3) service regulations require it.

F. If the reviewing JA recommends corrective action but the convening authority's acts to the contrary, the ROT is forwarded to OTJAG for review under R.C.M. 1201(b)(2). If the approved sentence includes dismissal, the service Secretary must review the case.

XIX. EXECUTION OF SENTENCES. UCMJ, ART. 71; R.C.M. 1113.

A. A sentence must be approved before it is executed (but confinement may be carried out before it is ordered executed).

B. The CA's initial action may order executed all punishments except a DD, BCD, dismissal or death.

C. A DD or BCD may be ordered executed only after a final judgment within the meaning of R.C.M. 1209 has been rendered in the case. *If on the date of final judgment a servicemember is not on appellate leave* and more than 6 months have elapsed since approval of the sentence by the CA, before a DD or BCD may be executed, the officer exercising GCM jurisdiction over the servicemember shall consider the advice of that officer's SJA as to whether retention would be in the best interest of the service. Such advice shall include the findings and sentence as finally approved, the nature and character of duty since approval of the sentence by the CA, and a recommendation whether the discharge should be executed.

XX. PROMULGATING ORDERS. ART. 76, UCMJ; R.C.M. 1114.

A summary of the charges and specifications is authorized (*see* Appendix 17, MCM).

XXI. ACTION BY THE JUDGE ADVOCATE GENERAL. ARTICLES 66 AND 69, UCMJ; R.C.M. 1201.

A. Cases automatically reviewed by a Court of Criminal Appeals (Art. 66).

1. Cases in which the approved sentence includes death.

2. Cases in which the approved sentence includes a punitive discharge or confinement for a year or more.

B. Scope of C.C.A. review: Both law and fact.

1. *United States v. Clifton*, 35 M.J. 79 (C.M.A. 1992). Courts of Military Review need not address in writing all assignments of error, so long as written opinion notes that judges considered assignments of error and found them to be without merit.

2. *United States v. Quigley*, 35 M.J. 345 (C.M.A. 1992) Choice of whether to call appellate court's attention to issue rests with counsel, although choice is subject to scrutiny for effective assistance of counsel in each case.

3. *United States v. Gunter*, 34 M.J. 181 (C.M.A. 1992). Error for CMR to deny accused's motion to submit handwritten matter for consideration by that court (detailed summary by appellate defense counsel not sufficient).

C. Power of Courts of Criminal Appeals. UCMJ, Art. 66(c):

"It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."

1. *United States v. Cole*, 31 M.J. 270 (C.M.A. 1990). "Article 66(c)['s] . . . awesome, plenary, *de novo* power of review" grants C.C.A.s the authority substitute their judgment for that of the MJ. It also allows a "substitution of judgment" for that of the court members.

2. *United States v. Claxton*, 32 M.J. 159 (C.M.A. 1991). A "*carte blanche*" to do justice. Sullivan in dissent notes C.C.A.s are still bound by the law.

3. *United States v. Keith*, 36 M.J. 518 (A.C.M.R. 1992) In appropriate case, Army Court may fashion equitable and meaningful remedy regarding sentence.

4. *United States v. Smith*, 39 M.J. 448 (C.M.A. 1994). Plenary, *de novo* power of C.C.A. does not include finding facts regarding allegations of which fact finder has found accused not guilty.

5. *United States v. Irvinspence*, 39 M.J. 893 (A.C.M.R. 1994). C.M.R. would not defer to findings on credibility by triers of fact in rape prosecution, but would consider their credibility determination after observing witnesses as factor in court's independent determination of credibility.

6. *United States v. Lewis*, 38 M.J. 501 (A.C.M.R. 1993). C.M.R. has authority to investigate allegations of IAC, including authority to order submission of affidavits and a hearing before a MJ.

7. *United States v. Joyner*, 39 M.J. 965 (A.F.C.M.R. 1994). In reviewing severity of sentence, C.M.R.'s duty is to determine whether accused's approved sentence is correct in law and fact based on individualized consideration of nature and seriousness of offense and character of accused.

8. *United States v. Gleason*, 39 M.J. 776 (A.C.M.R. 1994). C.M.R. standard for reassessing sentence instead of ordering rehearing: That which the court reliably knows a court would assess if there had not been error.

9. *United States v. Commander*, 39 M.J. 973 (A.F.C.M.R. 1994). C.M.R. may examine disparate sentences when there is direct correlation between each accused and their respective offenses, sentences are highly disparate, and there are no good and cogent reasons for differences in punishment. *See also United States v. Kelly*, 40 M.J. 558 (N.M.C.M.R. 1994).

10. *United States v. Pinegree*, 39 M.J. 884 (A.C.M.R. 1994). Reassess "inappropriately severe" sentence, not approving dismissal; *see also United States v. Hudson*, 39 M.J. 958 (N.M.C.M.R. 1994) (court did not approve BCD).

11. *United States v. Van Tassel*, 38 M.J. 91 (C.M.A. 1993). Standard of review of post-trial evidence of insanity is whether reviewing court is convinced BRD that fact finders would have no reasonable doubt that accused did not suffer from severe mental disease or defect so that accused lacked substantial capacity either to appreciate criminality of conduct or conform conduct to requirements of law, if offenses occurred before effective date of statute making lack of mental responsibility affirmative defense to be proven by defense.

12. *United States v. Dykes*, 38 M.J. 270 (C.M.A. 1993). Standard for ordering post-trial hearing on issue presented to appellate court.

a. Not required where no reasonable person could view opposing affidavits, in light of record of trial, and find the facts alleged by accused to support claim.

b. Required where substantial unresolved questions concerning accused's claim.

D. Cases reviewed by TJAG (Art. 69(a)).

1. Those GCMs when the approved sentence does not include a dismissal, DD, or BCD, or confinement for a year or more (Art. 69(a)).

2. Those cases where a JA finds, under R.C.M. 1112, that as a matter of law corrective action should be taken and the CA does not take action that is at least as favorable to the accused as that recommended by the JA (R.C.M. 1112(g)(l)).

3. Cases which have been finally reviewed, but not reviewed by a C.C.A. or TJAG (per R.C.M. 1201(b)(1)), may *sua sponte* or upon application of the accused under Art. 69(b) be reviewed on the ground of:

a. Newly discovered evidence.

b. Fraud on the court.

c. Lack of jurisdiction.

d. Error prejudicial to the substantial rights of the accused.

e. Appropriateness of the sentence.

4. TJAG may consider if the sentence is appropriate and modify or set aside the findings or sentence.

5. TJAG has the power to authorize a rehearing.

E. United States Army Legal Services Agency (USALSA).

1. Army Court of Criminal Appeals (Article 66, UCMJ).

2. Defense Appellate Division (Article 70, UCMJ).

3. Government Appellate Division (Article 70, UCMJ).

4. Examination and New Trials Division (Article 69, UCMJ).

XXII. REVIEW BY THE COURT OF APPEALS FOR ARMED FORCES. ARTICLES 67 & 142, UCMJ; R.C.M. 1204.

A. Authorized five judges.

B. Expanded role of Senior Judges.

C. Service of Article III Judges.

D. Cases reviewed:

1. All cases in which the sentence as approved by a Court of Criminal Appeals extends to death.

2. All cases reviewed by a Court of Criminal Appeals which TJAG orders sent to CAAF for review.

3. All cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, CAAF has granted a review.

4. Extraordinary writ authority.

E. *United States v. Schoof*, 37 M.J. 96 (C.M.A. 1993). Equal protection and due process challenge to TJAG's authority to certify issues under Art. 67.

F. *United States v. Jones*, 39 M.J. 315 (C.M.A. 1994). Power of CAAF usually does not include making sentence-appropriateness determinations. Province of CCA.

XXIII. REVIEW BY THE SUPREME COURT. ART. 67(H)(1), UCMJ; R.C.M. 1205.

A. Decisions of the Court of Appeals for Armed Forces may be reviewed by the Supreme Court by writ of certiorari.

B. The Supreme Court may not review by writ of cert. any action of CAAF in refusing to grant a petition for review.

XXIV. POWERS AND RESPONSIBILITIES OF THE SECRETARY. R.C.M. 1206.

Sentences that extend to dismissal of a commissioned officer, cadet, or midshipman may not be executed until approved by the Secretary concerned or his designee.

XXV. SENTENCES REQUIRING APPROVAL BY THE PRESIDENT. R.C.M. 1207.

That part of a court-martial sentence extending to death may not be executed until approved by the President.

XXVI. FINALITY OF COURTS-MARTIAL. R.C.M. 1209.

A. When is a conviction final?

1. When review is completed by a Court of Criminal Appeals and -

a. The accused does not file a timely petition for review by CAAF and the case is not otherwise under review by that court;

b. A petition for review is denied or otherwise rejected by CAAF; or

c. Review is completed in accordance with the judgment of CAAF and -

(1) A petition for a writ of cert. is not filed within applicable time limits;

(2) A petition for cert. is denied or otherwise rejected by the Supreme Court; or

(3) Review is completed in accordance with the judgment of the Supreme Court.

2. In cases not reviewed by Court of Criminal Appeals.

a. When the findings and sentence have been found legally sufficient by a JA, and when action by such officer is required, have been approved by the GCMCA, or

b. the findings and sentence have been affirmed by TJAG when review by TJAG is required under R.C.M. 1112(g)(1) or 1201(b)(1).

B. *Berry v. Judges of U.S. Army C.M.R.*, 37 M.J. 158 (C.M.A. 1993). Conviction not final until expiration of Art. 71(c) filing period. Abatement of proceedings appropriate when accused died before end of period.

C. *United States v. Jackson*, 38 M.J. 744 (A.C.M.R. 1993). Abatement after death of appellant, before appeal to Court of Military Appeals.

D. Finality and execution of sentences.

1. A DD or BCD may be ordered executed only after a final judgment within the meaning of R.C.M. 1209.

2. Dismissal may be approved and ordered executed only by the Secretary concerned.

3. Only President may order execution of death penalty.

XXVII. PETITION FOR A NEW TRIAL. ART. 73, UCMJ; R.C.M. 1210

A. Within 2 years of initial action by the CA.

B. Requirements:

1. Evidence discovered after trial.

2. Evidence not such that it would have been discovered by petitioner at time of trial in exercise of due diligence.

3. Newly discovered evidence, if considered by a court-martial in light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

C. Approval authority: OTJAG, C.C.A. or C.A.A.F.

D. Concern for avoiding *manifest injustice* is adequately addressed in three requirements in R.C.M. 1210(f)(2). *United States v. Williams*, 37 M.J. 352 (C.M.A. 1993).

E. *United States v. Hanson*, 39 M.J 610 (A.C.M.R. 1994). Petition for new trial based on newly discovered evidence.

F. *United States v. Niles*, 39 M.J. 878 (A.C.M.R. 1994). Petition for new trial not favored and, absent manifest injustice, will not normally be granted.

XXVIII. ASSERTIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

A. *United States v. Lewis*, 42 M.J. 1 (1995). Counsel's refusal to submit handwritten letter as part of PTM was error. Counsel may advise client on contents of PTM but final decision is client's. CAAF rejects the Army Court of Criminal Appeals' procedures for handling IAC allegations, originally set out in *United States v. Burdine*, 29 M.J. 834 (A.C.M.R. 1989), *review denied*, 32 M.J. 249 (C.M.A. 1990). Trial defense counsel should not be ordered to explain their actions until a court reviews the record and finds sufficient evidence to overcome the presumption of competence.

B. *United States v. Burdine*, 29 M.J. 834 (A.C.M.R. 1989). Two key points:

1. When the accused specifies error in his request for appellate representation or in some other form, appellate defense counsel will, at a minimum, invite the attention of the C.C.A. to those issues and it will, at a minimum, acknowledge that it has considered those issues and its disposition of them.

2. Guidelines for resolving IAC allegations:

a. Appellate counsel must ascertain with as much specificity as possible grounds for IAC claim.

b. Appellate defense counsel then will allow the appellant the opportunity to make his assertions in the form of an affidavit (explaining the affidavit is not a requirement, but also pointing out that it will "add credence" to his allegations.

c. Appellate defense counsel advises the accused that the allegations relieve the DC of the duty of confidentiality with respect to the allegations.

d. Appellate government counsel will contact the DC and secure affidavit response to allegations.

C. *United States v. Dresen*, 40 M.J. 462 (C.M.A. 1994). Counsel's request, in clemency petition, for punitive discharge was contrary to wishes of accused and constituted inadequate post-trial representation. Returned for new review and action.

D. *United States v. Pierce*, 40 M.J. 149 (C.M.A. 1994). Factual dispute as to whether DC waived accused's right to submit matters to the CA. HELD: Where DC continues to represent accused post-trial, there must be some showing of prejudice before granting relief based on premature CA action. Any error in failure to secure accused's approval of waiver not prejudicial in this case.

E. *United States v. Aflague*, 40 M.J. 501 (A.C.M.R. 1994). Where there is no logical reason for counsel's failure to submit matters on behalf of an accused and where the record glaringly calls for the submission of such matters, the presumption of counsel effectiveness has been overcome and appellate court should do something to cleanse the record of this apparent error.

F. *United States v. Robertson*, 39 M.J. 211 (C.M.A. 1994). DC submitted no post-trial clemency/response documents. Accused did not meet burden of showing that counsel did not exercise due diligence.

G. *United States v. Carmack*, 37 M.J. 766 (A.C.M.R. 1993). Defense counsel neglected to contact accused (confined at USDB) regarding post-trial submissions. Court admonished all defense counsel to live up to post-trial responsibilities; also, admonished SJAs and CAs to "clean up the battlefield" as much as possible.

H. *United States v. Sander*, 37 M.J. 628 (A.C.M.R. 1993). Court unwilling to adopt *per se* rule that DCs must submit post-trial matters in all cases.

I. *United States v. Jackson*, 37 M.J. 1045 (N.M.C.M.R. 1993). Since clemency is sole prerogative of CA, where defense counsel is seriously deficiently in post-trial representation, court reluctant to substitute its judgment for that of CA.

XXIX. RELEASE FROM CONFINEMENT *PENDENTE LITE*.

A. *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990). Moore successfully appeals his rape convictions before NMCMR and seeks release from confinement pending the government's appeal to C.A.A.F. HOLDINGS:

1. Under the All Writs Act, 28 U.S.C. 1651, C.M.R. and C.A.A.F. have authority to order deferment of confinement pending completion of appellate review.

2. If the accused has won a "favorable decision from the Court of Military Review," and "the situation is one in which the Government could establish a basis for pretrial confinement (*see* R.C.M. 305), then it should have the opportunity to show why the accused should be kept in confinement pending the completion of appellate review. This can best be handled by ordering a hearing before a military judge or special master [for a determination similar to that for pretrial confinement]."

XXX. CONCLUSION.